



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

Honorable H. L. Washburn
County Auditor
Harris County
Houston, Texas

Dear Sir:

Opinion No. 8-5935

Re: Authority of Harris County
to proceed by condemnation
or otherwise for additional
right-of-way and to expend
its funds for maintenance
of a portion of the right-
of-way during the proceed-
ings.

*overrules opinion
0-1942 in so far as it is in
Conflict with this
opinion.*

Your letter of March 15, 1944, requests the opin-
ion of this department on the above subject. We quote your
letter as follows:

"I respectfully request your opinion in con-
nection with the following:

"On July 3, 1942, the District Engineer of
the Texas Highway Department wrote to Mr. Albert
Townsend, Right of Way Agent for Harris County,
as follows:

"Replying to your letter of July first, I
am attaching hereto copy of Highway Commission
Minute No. 19475, designating the North Loop as
a State highway."

"Attached to this letter was a copy of a
portion of the Minutes of the State Highway De-
partment reading as set out in the order of the
Commissioners Court which I will hereafter quote.

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"The Right of Way Department sent the letter of the District Engineer to me, together with the copy of the Minutes of the Commission, and I thereupon transmitted it to the Commissioners Court of Harris County with the following letter:

"I attach a letter from Mr. Albert Townsend enclosing a copy of a minute order of the State Highway Commission on June 23, 1942, designating North Loop U. S. Highway 90 as a State highway. This minute should be approved by the Commissioners Court and the order recorded in its minutes. The Court thereupon should authorize Mr. Townsend, as Right of Way Agent, to obtain the necessary right of way, payable from the 1941 Bond Fund State Right of Way Budget in accordance with plans, specifications and surveys of the State Highway Department."

"On July 13, 1942, the Commissioners Court of Harris County entered an order in its Minutes, Volume 11, page 528, reading as follows:

"Moved by Commissioner Tautenhahn, seconded by Commissioner Graham, duly put and carried, it is ordered that the following order of the State Highway Commission, designating North Loop U. S. Highway No. 90 as a State highway be approved:

"In Harris County, it is ordered that a loop on U. S. 90, in the vicinity of Houston, be and is hereby designated for future construction and maintenance purposes, extending from a connection with the present U. S. Highway 90 east of the Post Oak Road west of Houston, thence northeast to a connection with U. S. Highway 290, thence east through the north side of Houston along, or in the vicinity of 29th Street, Linder Street and Stonewall Street, thence to a connection with U. S. Highway 90 east of Houston, this

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designation to include such connections as are necessary to serve State Highway 73 east of Houston, it being clearly understood that this designation shall not in any manner include any portion of the now existing Post Oak Road."

"And it is further ordered that Albert Townsend, Right of Way Agent, be authorized to secure the necessary right of way payable from the 1941 Bond Fund, State Right of Way Budget, in accordance with plans and specifications and surveys of the State Highway Department."

"Immediately thereafter, the Right of Way Department of Harris County, as the agents of the State Highway Department, proceeded to the acquisition of all necessary right of ways under authority of Article 6674n, Vernon's Annotated Civil Statutes. Under the field notes and data supplied by the Highway Department, the right of way acquired was originally 100 feet, but after a portion of the necessary lands had been acquired, the plans were widened to 150 feet. Some of the connecting roads already in existence formed links in the new highway. The whole project will be referred to in this letter as the 'North Loop'.

"As an example of the particular problem which confronts me, I will take Kelly Street, which was originally a 60-foot County road. None of the connecting roads in the North Loop were any wider than 60 feet. In all cases where there was an existing roadway, in order to comply with the requirements of the State Highway Department, it was necessary to get at least 90 feet of additional right of way to widen the existing roadway. This was true in the case of Kelly Street. Kelly was originally 60 feet wide, and at the request of the Highway Department,

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an additional 40 feet was first obtained, 20 feet on either side of the original roadway. Subsequently, the Right of Way Department was ordered to obtain an additional 50 feet, making the total width 150 feet. Actual construction by the Highway Department on Kelly Street has not been begun, although a great deal of the right of way has been acquired, and the street has been widened upon land taken in the name of the State.

"In 1941, various bond issues were submitted to the voters of Harris County. One of the issues submitted was for \$900,000.00 to be used for the specific purpose of acquiring right of ways for State highways. The bonds were voted because the funds available to the County otherwise were insufficient to pay for the large amounts of expensive right of way required for the construction of the State highways. The bond proceedings specifically provided that no part of these funds should ever be expended for any other purpose than the acquisition of right of ways for designated State highways.

"I have quoted the correspondence and the orders above for the purpose of showing that there was no question in the mind of any of the officials who came in contact with the matter originally that the designation by the Highway Commission of the North Loop was final. Otherwise, expenditure of bond funds from the 1941 bond issue could not possibly have been made for the purpose of paying for this right of way, as, unless it did actually constitute a State highway, the expenditure of such funds thereon would constitute a diversion, under the authority of such cases as Moore, County Judge, vs. Coffman, 109 Tex. 96, 200 S.W. 374; and Black, et al. vs. Strength, County Judge, 246 S.W. 79. The proceedings for the issuance of the bonds specifically pledged this fund

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for this particular purpose. It is obvious that no portion of this fund could be expended for the acquisition of right of ways for County roads.

"There is still much of the right of way on the North Loop to be acquired. The only funds available for the purchase of such right of way are the bond funds above mentioned. The Commissioners Court and I were of the opinion that the order of the State Highway Commission was sufficient, taken in connection with all of the other proceedings which have been since had, to constitute the North Loop a part of the State Highway System. Hence, the bond funds have been and are now being used for the purpose of paying for the widened right of way and the acquisition of new right of way for this State highway.

"Was such action lawful? Is the County authorized to proceed by condemnation or otherwise, as the agent of the State, to acquire the additional necessary right of way for this project and to pay for it out of the bond fund above mentioned?

"These questions have been raised at this somewhat late date because of difficulties which have arisen particularly in connection with Kelly Street, but which will be applicable to the North Loop as a whole. By reason of its widening and increased traffic, Kelly Street has gotten into a very bad condition. One of the members of the Commissioners Court took the matter up with the Resident Engineer, and informed him that it would be necessary to add to this street a considerable amount of material. In the opinion of the Commissioner, it will be necessary to add to this street shell or other paving material in excess of 1,000 cubic yards. The Resident Engineer addressed a letter to the County Commissioner under date of March 7, indicating

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that he was of the opinion that the maintenance of this portion of this State highway was the problem of Harris County. His letter states that it is the custom of the Highway Commission to take over such roads 'for maintenance' only 'after the construction is completed'.

"I find myself unable to agree with the conclusions expressed by the District Engineer of the State Highway Commission. I am of the opinion that the County is expressly prohibited by law from making any further expenditures on the North Loop, except the acquisition of right of ways. We have been proceeding with the acquisition of the right of way in accordance with the provisions of Article 6674n, Vernon's Annotated Statutes. As you know, the decisions construing this statute have said that it does nothing more than to authorize the county, as the agent of the State, to acquire the necessary right of way. In this connection, the Supreme Court, in the case of Robbins vs. Limestone County, 114 Tex. 345, 268 S.W. 915, 918, said in part:

"The establishment of public highways being primarily a function of government belonging to the state, the right to establish them resides primarily in the legislature, and in the absence of constitutional restrictions, the legislature may exercise that right direct or delegate it to a political subdivision of the state, or to such other agency or instrumentality, general or local in its scope, as it may determine. The exercise of this right by a political subdivision of the state, or by local officers, is founded upon statutory authority therefor. The legislature may exercise possession of public roads and control over them, by and through such agencies as it may designate."

"It is well settled that the statutes give exclusive control over all State highways to the State Highway Commission. Formerly, the counties

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were authorized to aid in the construction and maintenance 'of any section or sections of a macadamized, graveled or paved road or turnpike in said county constituting a part of the State Highway System and to enter into contracts or agreements with the State Highway Department for that purpose.' Article 6674c, R.S. 1925. This authority was expressly repealed by Acts 1932, 42d Legislature 3d C.S., page 15, Chapter 13, Section 3. Not satisfied with a mere repeal of the authority theretofore given to the county to expend funds for maintenance of State highways, the legislature by statute expressly prohibited such expenditures, other than for right of ways. Article 6674q-4, Vernon's Ann. St., reads as follows:

"'All further improvement of said State Highway System shall be made under the exclusive and direct control of the State Highway Department and with appropriations made by the legislature out of the State Highway fund. Surveys, plans and specifications and estimates for all further construction and improvement of said system shall be made, prepared and paid for by the State Highway Department. No further improvements of said system shall be made with the aid of or with any money furnished by the counties except the acquisition of right of ways which may be furnished by the counties, their subdivisions or defined road districts. But this shall in no wise affect the carrying out of any binding contracts now existing between the State Highway Department and the Commissioners Court of any county, for such county, or for any defined road district. In the development of the system of State highways and the maintenance thereof, the State Highway Commission shall from funds available to the State Highway Department, provide:

"'(a) For the efficient maintenance of all highways comprising the State system.

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"(b) For the construction, in cooperation with the Federal government to the extent of Federal aid to the State, of highways of durable type of the greatest public necessity.

"(c) For the construction of highways, perfecting and extending a correlated system of State highways, independently from State funds."

"It is to be noted that subdivision (a) above quoted, taken in connection with the sentence preceding it, makes it the express statutory duty of the State Highway Commission to maintain all State highways. The other sentence preceding that which I have underscored above prohibits the expenditure of money by the counties on such highways. The use of the word 'improvements' in the first underscored sentence cannot be misconstrued because the statute (Article 6674a) defines it to mean:

"The term 'improvement' shall include construction, reconstruction or maintenance, or partial construction, reconstruction or maintenance and the making of all necessary plans and surveys preliminary thereto."

"It is plain to me, therefore, that the statute expressly prohibits the County from expending County funds upon maintenance of a State highway. If there are any other statutes or decisions which would affect this conclusion, they have escaped me. Is my view of these statutes correct?

"Considerable sums of money are now being expended upon this highway upon the theory that it is a State highway. As above stated, these funds are the proceeds of bond funds which cannot be otherwise expended. If the Commissioners Court and I are mistaken in our views that the order of the Highway Commission

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and the subsequent actions in requesting the acquisition of the additional right of ways, actually made this North Loop a State highway, then of course the expenditure of any further funds from the proceeds of the bond issue for the purchase of right of way as for a State highway would be unlawful. On the other hand, if it is a part of the State Highway System, it seems to me that the County is expressly prohibited by the statute from expending any funds in maintaining any portion of it. Please give me your opinion upon these matters, in answer to the questions above specifically propounded."

Article 6674n, Revised Civil Statutes of 1925 as amended by Acts 1933, 43rd Legislature, Chapter 207; Acts 1935, 44th Legislature, Chapter 199, cited but not quoted above reads in part as follows:

"Whenever, in the judgment of the State Highway Commission, the use or acquisition of any land for road, right of way purposes, timber, earth, stone, gravel or other material, necessary or convenient to any road to be constructed, reconstructed, maintained, widened, straightened or lengthened, or land not exceeding one hundred (100) feet in width for stream bed diversion in connection with the locating, relocating or construction of a designated State Highway by the State Highway Commission, the same may be acquired by purchase or condemnation by the County Commissioners Court. Provided that the County in which the State Highway is located may pay for same out of the County Road and Bridge Fund, or any available county funds.

"Any Commissioners Court is hereby authorized to secure by purchase or by condemnation on behalf of the State of Texas, any new or wider right of way or land not exceeding one hundred (100) feet in width for stream bed

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diversion in connection with the locating, re-locating or construction of a designated State Highway, or land or lands for material or borrow pits, to be used in the construction, reconstruction, or maintenance of State Highways and to pay for the same out of the County Road and Bridge Fund, or out of any special road funds or any available county funds. The State Highway Commission shall be charged with the duty of furnishing to the County Commissioners Court the plats or field notes of such right of way or land and the description of such materials as may be required, after which the Commissioners Court may, and is hereby authorized to purchase or condemn the same, with title to the State of Texas, in accordance with such field notes. Provided that in the event of condemnation by the County the procedure shall be the same as that set out in Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, of 1925. Provided that if the County Commissioners Court of any County in which such right of way is, in the judgment of the State Highway Commission, necessary for the construction of a part of a designated State Highway shall fail or refuse to secure by purchase or by condemnation for or on behalf of the State of Texas, such right of way or part thereof, immediately and as speedily as possible, under said Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, of 1925, after being served with a copy of an order of the State Highway Commission identifying by field notes, the part of the Highway necessary for the construction of such designated State Highway and requesting such County Commissioners Court to secure same, then and in such event and within ten (10) days after the service of such notice, said State Highway Commission shall direct the Attorney General of Texas, to institute condemnation proceedings in the name of the State of Texas, for the purpose of securing such right of way. The right of eminent domain to condemn any part of a right of way for a State designated highway,

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under the conditions herein set out is hereby conferred on the State Highway Commission and the jurisdiction for the exercise of such right is hereby conferred on the County Court of Travis County. . . ."

The courts of Texas have consistently held that Article 6674n, supra, authorizes the commissioners' court as agent for the State to purchase or condemn land for right-of-way purposes whenever in the judgment of the State Highway Commission the use or acquisition of such land is necessary or convenient in connection with the locating, re-locating or construction of a designated State Highway; and that the determination of the width of the strip of land to be acquired remains within the discretion of the Highway Commission. Wilbarger County vs. Hall, 55 S.W. (2d) 797; Robbins vs. Limestone County, 268 S.W. 915; Heathman vs. Singletary, 12 S.W. (2d) 150; Iverson vs. Dallas County, 110 S.W. (2d) 255; Watt vs. Studer, 22 S.W. (2d) 709 and San Patricio County vs. Maxwell, 56 S.W. (2d) 295.

Accordingly, in answer to your first question, we advise that the expenditure of the county funds described in your letter for State Highway right-of-way purposes was and is authorized.

Your second question presents a problem more difficult of proper determination. It appears to us that the paramount point controlling the main issue is as to when a route or road becomes a designated "State Highway" or a part of the "State Highway System". To arrive at the conclusion herein reached we have made a diligent study of the history of the legislation that enumerates the rights, duties and powers of the Highway Commission and the commissioners' courts together with an exhaustive search of court decisions construing the various statutes.

Prior to the adoption of Article 6674n, supra, as amended, the various counties located, constructed and maintained in whole or in conjunction with the Highway Department, the public roads within their respective boundaries. In many instances by contract with the Highway Department the counties provided funds for all preliminary, intermediate and complete expenditures necessary in the selection of

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a route and the construction of a road for highway purposes, frequently sharing in the expense of maintenance thereof after such road had been accepted as a State Highway.

The State Highway Department, pursuant to its creation and delegated authorities, over a period of years, "exercised its powers and functions through the several counties and defined road districts of the State as its agencies for said purposes, and later resumed full and sole administration, control of, and jurisdiction over, the laying out, establishment, construction and maintenance of all public roads which were, or might become, a part of the system of designated State Highways".

Subsequently, in 1932, Acts of the 42nd Legislature, 3rd Called Session, Chapter 13 thereof (Article 6674q-1-14), the "State Assumption of Highway Bonds" Act was adopted, reading in part from the caption thereof as follows:

"Declaring a State policy with reference to the construction and maintenance of a system of State highways from a source of income other than ad valorem taxes; providing for the control, construction and maintenance of a system of State highways at state expense, and permitting the counties to furnish rights-of-way."

The State Highway Commission is authorized under Articles 6673, V.A.C.S. "to take over and maintain the various State Highways in Texas, and the counties through which said highways pass shall be free from any cost, expense or supervision of such highways." And in Article 6674a, "Definition of Terms", it is said:

"The term 'highway' as used in this act shall include any public road or thoroughfare or section thereof and any bridge, culvert or other necessary structure appertaining thereto. The term 'improvement' shall include construction, reconstruction or maintenance, or partial construction, reconstruction or maintenance and the making of all necessary plans and surveys preliminary thereto." (Emphasis ours)

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Article 6674e entitled "Appropriations from Highway Fund" reads as follows:

"All moneys now or hereafter deposited in the State Treasury to credit of the 'State Highway Fund', including all Federal aid moneys deposited to the credit of said fund under the terms of the Federal Highway Act and all county aid moneys deposited to the credit of said fund under the terms of this Act shall be subject to appropriation for the specific purpose of the improvement of said system of State Highways by the State Highway Department. (Inserted by compiler from Acts 1925, 39th Leg., ch. 186, p. 457, § 5.)" (Emphasis ours)

Following the provisions for the appropriations from the State Highway Fund the Legislature provided, in Article 6674h, V.A.C.S., that "all contracts proposed to be made by the State Highway Department for the improvement of any highway constituting a part of the State Highway System or for materials to be used in the construction or maintenance thereof shall be submitted to competitive bids."

Chapter 324, 48th Legislature, 1943 (Article 6674q-1-14) constitutes the last passage of the Road Bond Assumption Act. The intervening Legislatures from 1932 to 1943 enacted measures similar, with slight modifications. For the purpose of this opinion such Act will hereafter be referred to as Article 6674q.

Article 6674q-1 expresses the policy of the State and we quote therefrom as follows:

" it is further declared to be the policy of the state to take over, acquire, purchase, and retain the interest and equities of the various counties and defined road districts in and to the highways, not previously taken over, acquired, and purchased and constituting on January 2, 1939, a part of the system of designated State Highways, and to acquire and purchase the interest and equities of the various counties and defined road districts in and to the roads not constituting a part of the

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system of designated State Highways as of January 2, 1939, and under the provisions of this Act to acquire such interest and equities in such roads hereafter to be constructed with money furnished by the state, and to reimburse said counties and districts therefor, and to provide for the acquisition, establishment, construction, extension and development of the system of designated State Highways of Texas, from some source of income other than the the revenues derived from ad valorem taxes,

The Legislature, as indicated in Article 6704, V.A. C.S., restricted the maximum width to which the commissioners' court may establish a county road to 100 feet. Reading from the Act we find as follows:

"Art. 6704.

"The commissioners' court shall classify all public roads in their counties as follows:

"1. First class roads shall be clear of all obstructions, and not less than forty (40) feet nor more than one hundred (100) feet wide;
"

Considering the above cited statutes together, we find:

1. That the State Highway Department has sole and exclusive jurisdiction over "State Highways", and the "State Highway System", locating, constructing and maintaining such out of State funds.

2. That the counties may, as agents for the State, purchase or condemn land for State Highway purposes.

3. That when a public road becomes a part of the "State Highway System" or a designated

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"State Highway" the counties cannot render further aid or expend funds thereon.

4. That the State Highway Department shall receive competitive bids for the construction or reconstruction of any part of the State Highway System.

5. That a county road may not be established etc. at a width greater than the maximum of 100 feet.

The pertinent facts, necessary to the determination of this question may be stated as follows:

1. Harris County, by bond election, created a fund to be used for the particular purpose of purchasing rights-of-way for State Highways in Harris County.

2. The State Highway Commission, by order dated June 23, 1942, designated the road in question "for future construction and maintenance purposes" reciting further in said order, "this designation to include such connections as are necessary to serve Highway 73 east of Houston".

3. The commissioners' court, pursuant to solicitation by the Highway Commission, proceeded to acquire the necessary 150 foot right-of-way acting as agents of the State for State Highway purposes.

4. Kelly Street, an integral part of the selected route, having been widened to 150 feet is in urgent need of repair to accommodate the existing traffic thereon.

Having considered the relative statutes and reviewed the facts, we must now seek to determine the intention of the Legislature as it appears in the written portions of the law and the implied provisions if such are found to exist. Before attempting to give our conclusions, we think it pertinent here to briefly state the question we seek to answer:

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Does Kelly Street become a part of the State Highway System or become a State Highway, within the purview of the numerous statutes, by virtue of the order of the Highway Commission dated June 23, 1942, and the subsequent acts of the commissioners' court pursuant thereto?

Article 6673, supra, defines, among other things, improvement to include "and the making of all plans and surveys preliminary thereto." Article 6674e, supra, provides that the "State Highway Fund" shall be used for the specific purpose of the improvement of said system of State Highways by the State Highway Department. "All contracts proposed to be made by the State Highway Department for the improvement of any highway constituting a part of the State Highway System . . . shall be submitted to competitive bids". Article 6674h, V.A.C.S.

The 48th Legislature in Chapter 324, supra, declared it the policy of the State to take over the burden of the State Highway System and to reimburse the respective counties for moneys heretofore expended on such system; to provide for the acquisition, establishment, construction, etc. of such from funds other than those raised by the county; expressed not only that all further improvement of such System shall be made out of the State Highway Fund, but went further to say that no further improvement of said System shall be made with county money, except the acquisition of rights-of-way.

The right of eminent domain to condemn any part of an 150 foot right-of-way for a State designated highway rests exclusively on the Highway Commission. Article 6674n, supra; Robbins vs. Limestone County, supra; Wilbarger County vs. Hall, supra; Watt vs. Studer, supra; Iverson vs. Dallas County, supra; and Angier vs. Balser, infra.

Authority of the commissioners' court to condemn land for county road purposes has been construed to limit its taking of a right-of-way to a maximum width of 100 feet as provided in Article 6704, supra. Bryan vs. McKinney, 279 S.W. 475.

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Our search has revealed a vast number of court decisions dealing with the rights and powers of the State Highway Commission and the commissioners' court in condemning land for Highway purposes, including many involving the question of liability for damages sustained during the layingout, construction and maintenance of such highway. Every decision consistently holds that from the instant of the selection of a route and the designation of such to be a part of the State Highway System, thus authorizing the commissioners' court to proceed under Article 667⁴ⁿ, supra, that the sole and exclusive jurisdiction of such route rests in the State Highway Department. In many instances the route in question was merely a naked surveyed strip across fields, farms or pastures with no road improvement; another situation found a house and farm improvements established within the right-of-way boundaries of the staked new location or route. In every single case the court held that such location, route or plan constituted a part of the State Highway System and was designated for State Highway purposes. Watt v. Studer, supra; Shelby County v. Caldwell, 48 S. W. (2d) 761; Fletcher v. King, 79 S. W. (2d) 980; Mosel v. Real, 49 S. W. (2d) 475; Aue v. State, 77 S. W. (2d) 606.

In the case of San Patricio county vs. Maxwell, supra, the Highway Commission selected a proposed route as Highway No. 9 through the lands of Hughes, Lane and Horn. The commissioners' court proceeded to acquire the necessary land and by agreed judgment obtained the property of appellees. The Highway Commission prior to the commencement of construction over such route elected to change such designation and selected an entirely different one. Appellees sought and obtained an injunction in the district court restraining said commissioners' court from abandoning the route first designated and from procuring the right-of-way over the newly designated route around the lands of Hughes, Lane and Horn.

The Court of Civil Appeals in reversing the judgment dissolved the injunction and said in part as follows:

"It is apparent from the bill on which the writ was granted that highway No. 9 is a properly designated 'State Highway' over which the

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highway department has control, and that the county commissioners' court is acting for and in behalf and under the control of that department in procuring the right of way for said highway, as provided in article 6674n, as amended by the Forty-First Legislature (Acts 1930, 41st Leg., 5th C.S., p. 243, c. 79, § 1 (Vernon's Ann. Civ. St. art. 6674n). It follows, therefore, and is apparent from the petition below, that the power of designating the route of highway No. 9, with reference to the lands of Hughes, Lane, and Horn, rests in the highway department, and not in the commissioners' court, and that the state highway commissioners are necessary parties to any litigation affecting the exercise of that power. . . ."

Similar facts existed in the case of Mairn, et al. vs. Bean, et al., supra, and in others too numerous to cite here.

In Angier vs. Balser, supra, the commissioners' court was attempting to condemn a right-of-way greater in width than 100 feet. Appellant sought to enjoin such as illegal because violative of subdivision 1 of Article 6704, Revised Statutes of 1925 as amended by Chapter 197, paragraph 1, Acts 1929, (Article 6704, V.A.C.S.). The Austin Court of Civil Appeals held that the commissioners' court acted as agents for the State upon solicitation by the State Highway Commission; that the highway to be constructed across appellant's land had been duly designated as a State Highway and that such taking for State Highway purposes was not violative of such Article. Citing Brown vs. McKinney, supra.

Briefly we wish to call to your attention other points relating to the statutes involved here upon which the courts of Texas have placed their construction.

Funds from the sale of bonds voted by a county for State Highway purposes cannot be used otherwise. Fletcher vs. King, supra.

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Bonds ordered for State right-of-way purposes for improvement of Highway 27 could be used for right-of-way purposes of newly designated route of Highway 27. Mosel vs. Real, et al., supra.

Construction of any part of route by Highway Department makes the State responsible in damages to injured party because such constitutes a part of the State Highway System. City of Wichita Falls vs. Real Estate Trust Co., 135 S. W. (2d) 736; Cernouch vs. Colorado County, 48 S. W. (2d) 471.

Immediately when such route is laid out or construction is started the commissioners' court has no further power, for county purposes, in connection therewith. Wilbarger County vs. Hall, supra.

Being unable to find authority conflicting with the above decisions, we conclude that a designated State Highway or a part of the State Highway System cannot be measured by degrees as such but that the statutes expressly constitute, and by law determine, when such route or road becomes a designated part of the System. The Highway Commission has exclusive jurisdiction in the selection of such route or road as will constitute such System, but immediately upon its exercise of such discretion and the entering of its order delegating to the commissioners' court the authority to acquire the necessary land and such court proceeds accordingly, such route or road becomes duly designated.

We therefore, advise that in our opinion Kelly Street could not constitute a designated State Highway or a part of the State Highway System and at the same time be a county road. Accordingly Harris County cannot pay for the maintenance or improvement of the road as such would constitute an unauthorized undertaking and the illegal spending of county funds.

Our opinion No. 0-1942, approved August 16, 1940, relating to the date upon which certain bonds may become eligible for participation in county and Road District Highway Funds, does not concern the identical question discussed here, and does not conflict with the conclusions herein stated.

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We wish to thank you for the excellent letter which was very helpful and hope that we have satisfactorily answered the questions presented.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Harris Toler*
Harris Toler
Assistant

HT:ff

H. L. Washburn
H. L. Washburn
Attorney General of Texas

